

# A Missed Opportunity for LGBTQ Rights

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A few days ago, the British activist Gareth Lee failed with his complaint before the European Court of Human Rights (ECtHR). The Court declared the application inadmissible as Lee had not claimed the violation of rights under the European Convention on Human Rights in any of the national court proceedings and thus had not exhausted all national remedies. [Lee v. the United Kingdom](#) really was a missed opportunity for Europe's regional human rights court to address the issue of homophobia in the context of access to goods and services.

## Lee v. the United Kingdom

In 2014, a Northern Irish bakery had refused to deliver a cake ordered by Lee with the words „Support Gay Marriage“ and the QueerSpace logo on it. The applicant was told by the bakery that his cake could not be made because the bakery was a Christian business. The case reached the Supreme Court, which found no discrimination against the applicant on grounds of sexual orientation. It held that the bakery's objection related to the cake's message and not to the applicant's sexual orientation. Lee complained to the ECtHR arguing that his rights under Article 8 (private life), Article 9 (freedom of religion) and Article 10 (freedom of expression), alone and in conjunction with Article 14, had been violated.

Now, the ECtHR declared the case inadmissible. Relying on cases such as [Azinas v. Cyprus](#), the Court referred to the Convention's subsidiary character. In *Azinas*, for example, the Grand Chamber had found that 'It would be contrary to the subsidiary character of the Convention system if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument.'

In *Lee*, the Court also underlined that 'it is not immediately apparent how the findings of the Supreme Court and the consequences of those findings for the applicant either constitute one of the modalities of or are linked to the exercise of a right guaranteed by any of those Articles.'

The Court noted that Lee did not invoke his Convention rights expressly at any point in the domestic proceedings and stressed that it was not convinced by his arguments, namely that the domestic law provisions on which he relied existed to protect his aforementioned rights and that the violations complained about only crystallized with the judgement of the Supreme Court, after which there were no further available remedies on a national level.

It appears to me that through the above reasoning, the Court puts all its energy into avoiding answering important questions, offering no analysis of any of the articles cited by the applicant, and thus leaving key legal questions unanswered. The deputy director of the [Committee on the Administration of Justice](#) (a third party intervener in the case) described this as a ‘missed opportunity’ for the ECtHR to ‘clarify its case law on sexual orientation and discrimination in the private sector.’

## The US Cake Case

A brief discussion of the US Supreme Court jurisprudence is merited, since, in *Lee*, both the Supreme Court and the ECtHR referred to the 2018 case of [Masterpiece Cakeshop Ltd v. Colorado Civil Rights Commission](#). This case involved a baker’s refusal to make a cake for the marriage celebrations of a same-sex couple due to his religious beliefs. The lower courts had all found in favour of the clients because the Colorado Anti-Discrimination Act (2015) prohibits businesses from discriminating on the basis of sexual orientation. However, the strong First Amendment tradition of the country meant that the direction changed at the Supreme Court. The First Amendment provides that ‘Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.’

As such, free speech holds a particularly [strong position](#) in the US legal order. As a result, in *Masterpiece*, with two dissenting opinions, the Supreme Court found that the [Commission’s position](#) violated the State’s prohibition under the First Amendment to pass laws which are founded on hostility to a religion or religious viewpoint. The Court underlined that the baker, Philips, was ‘entitled to a neutral and respectful consideration of his claims’ which was ‘compromised’ due to the Commission’s demonstration of ‘impermissible hostility’ towards his religious beliefs. In citing this case, the ECtHR in *Lee* referred to the US Supreme Court’s position that such disputes ‘must be resolved with tolerance, without undue disrespect to sincere religious beliefs and without subjecting gay persons to indignities when they seek goods and services.’ How the ECtHR actually implemented this is unclear, given the stringency it applied to the admissibility requirements.

Interestingly, at the time of the US ‘cake case’, another judgement was passed, [Arlene’s Flowers v. State of Washington](#). This case dealt with a florist who refused to arrange the flowers for a same-sex marriage. The US Supreme Court was asked to take up the case in 2017. It sent it back down to the Washington Supreme Court, with instructions to reconsider it given the *Masterpiece* judgement. In 2019, the Washington Supreme Court ruled against the florist for a second time. She asked the US Supreme Court to hear her case, but it rejected her request. A significant element in this case (had it been heard by the Supreme Court) and other future cases, would have been the court’s legal analysis of [‘the nexus between the First Amendment and anti-discrimination laws in the absence of \(alleged\) hostility on the part of lower courts or bodies’](#). This is because the *Masterpiece* case dealt extensively with the alleged hostility the Commission had shown towards the baker and his beliefs. This took up much of the Court’s reasoning. The emphasis on the

alleged hostility may have stood in the way of a more extensive assessment of the rights of the LGBTQ community to access goods and services.

## Goods, Services and Homophobia

In 2010, the Parliamentary Assembly of the Council of Europe adopted a resolution entitled '[Discrimination on the Basis of Sexual Orientation and Gender Identity](#).' This calls on States Parties to, *inter alia*, protect the LGBTQ community from discrimination (making specific reference to the facilitation of access to goods and services by transgender persons) and to ensure effective judicial involvement where discrimination cases arise. The 2010 Recommendation of the Committee of Ministers on '[Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity](#)' looks at issues such as free speech, hate crime and hate speech, whilst the area of 'goods and services' is restricted to health, housing and education. On a European Union (EU) level, things are relatively bleak in terms of protection against discrimination of LGBTQ communities when it comes to goods and services. [The Racial Equality Directive](#) encompasses equal treatment in relation to employment, vocational training, social protection and social advantages, education and access to and supply of goods and services. In contrast, [the General Framework for Equal Treatment in Employment and Occupation](#), which prohibits discrimination on the basis of other characteristics, such as sexual orientation, is limited to the workplace. This distinction has led to the 2000 directives carrying '[an aura of unfinished business](#),' with no convincing explanation for this difference having been put forth yet. In 2014, the European Parliament passed the '[Roadmap against Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity](#).' In it, the Parliament highlights its belief that the EU 'currently lacks a comprehensive policy to protect the fundamental rights of LGBTQ people.' For this reason, it called on the Commission, Member States and the relevant agencies to work jointly on a comprehensive multiannual policy to protect the fundamental rights of LGBTQ persons.

Undoubtedly, then, the differences between the directives' applicability and purpose affect the quality and efficacy of any national law that transposes the directives as they stand. In brief, EU non-discrimination protection on the basis of sexual orientation '[demonstrates a hierarchy of what the EU considers as significant enough to be actionable](#).'

## A Missed Opportunity

*Lee* really was a missed opportunity for Europe's regional human rights court to address the issue of homophobia in the context of access to goods and services, particularly in the absence of an EU framework. The ruling could have been a guiding light not only for a post-EU United Kingdom but also for the other members of the Council of Europe. Moreover, it is another thorn in the side of the current framework in which the rights of the LGBTQ community are less protected than those of other communities.

